



**THE ATTORNEY GENERAL  
OF TEXAS**

**MATTOX  
ATTORNEY GENERAL**

April 19, 1990

Robert Bernstein, M.D.,  
F.A.C.P.  
Commissioner  
Texas Department of Health  
1100 West 49th Street  
Austin, Texas 78756-3199

Open Records Decision No. 549  
  
Re: Confidentiality of information regarding a contract between the Texas Department of Health and AIDS Foundation (RQ-1933)

Dear Dr. Bernstein:

You advise that the Texas Department of Health (TDH), pursuant to the Human Immunodeficiency Virus Services Act, V.T.C.S. art. 4419b-4, provided a grant to a certain foundation (hereinafter, the "foundation") for the conduct of an HIV education and prevention program. You have received a request, pursuant to the Open Records Act, V.T.C.S. art. 6252-17a, for copies of all records concerning this program. You ask whether certain information with respect to this request is excepted from required public disclosure.

You have submitted for our inspection two categories of information. The first category of information is identified as attachment "B" and consists of information prepared by TDH staff members. You claim that this information is excepted from public disclosure by section 3(a)(11) of the Open Records Act.

Section 3(a)(11) excepts from public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." It is well established that the purpose of section 3(a)(11) is to protect from public disclosure advice, opinion, and recommendation used in the decisional process within an agency or between agencies. This protection is intended to encourage open and frank discussion in the deliberative process. See, e.g., Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.); Attorney General Opinion H-436 (1974); Open Records Decision No. 470 (1987).

You describe the preparation and use of the information in attachment "B" as follows:

Staff members in the Department's Bureau of HIV and STD prepare this information in their official role as reviewers and evaluators of grant applications, and the information represents the advice, recommendations and opinions of the reviewers concerning the grants applications. After the staff completes its review, the staff sends the information to the administrative decision makers in the Bureau of HIV and STD, who in turn use this information in making decisions to approve or disapprove individual grant applications.

We have reviewed the information in attachment "B" and find that, except for the document titled "AIDS Prevention/Services Project Grants" it consists of advice, opinion, and recommendation excepted from public disclosure by section 3(a)(11). The document titled "AIDS Prevention/Services Project Grants" largely consists of purely factual information in the form of a checklist for the contents of a grant application. For example, the following items are included in the checklist:

4. Are budget pages 1, 5, 9, 13, submitted with application?
5. Does the budget justification section clearly establish the need for each budget item requested?
6. Has non-profit status been declared? Are the names of two representatives submitting the application provided? (Private sector non-profit health agencies)

The final section of this document, titled "other comments" consists of the reviewer's written opinions and recommendations. Objective observations of facts are not excepted from public disclosure by section 3(a)(11). Open Records Decision No. 450 (1986). Therefore, with the exception of the section titled "other comments" the document titled "AIDS Prevention/Services Project Grants" must be released. All other documents in attachment "B" may be withheld.

The second category of information submitted for our inspection is identified as attachment "C" and consists largely of comments or complaints received by TDH with respect to the foundation. One document in attachment "C," identified as attachment "C-6," consists of an inter-office memorandum of TDH, along with handwritten notes on which the memorandum is apparently based. The memorandum and notes recite information obtained from informants with regard to the foundation and individuals associated with the foundation. You claim the documents contained in attachment "C" are excepted from public disclosure by the informer's privilege aspect of section 3(a)(1) of the Open Records Act. Additionally, you claim that the document identified as attachment "C-6" is not "public information" within the meaning of section 3(a), and not subject to the Open Records Act.

With respect to your assertion that attachment "C-6" is not "public information," you state that TDH investigators determined that some of the information provided by informers had nothing to do with the grant funded program. Therefore you state, with respect to such information:

The Department believes that this information was not collected pursuant to law or ordinance or in connection with the transaction of official business. It is true that the Texas Supreme Court has held that information is not excluded from the [Open Records Act] simply on the basis that the information does not relate to the affairs of government or official acts of public officials. See Industrial Foundation of the South v. Texas Industrial Accident Bd., 540 S.W.2d 668, 674-75 (Tex. 1976), cert. den., 430 U.S. 931 (1977). However, the Court also said on p. 676 that all information collected by public officials and employees is subject to the [Open Records Act], except in unusual circumstances (emphasis added).

By the emphasized language in the Industrial Foundation case, the court indicated that the Attorney General could rule that in unusual circumstances some information would not be public information under the Open Records Act. The Department believes that unusual circumstances exist in this case because the previous mentioned information concerning [the president of the

foundation] and certain other information in Attachment ["C-6"] has nothing whatsoever to do with the [foundation's] contract.

In Industrial Foundation the defendants argued (with respect to privacy concerns) that a broad reading of the definition of "public information" would lead to the inconsistent result of requiring disclosure of the affairs of private citizens under an act intended to require disclosure of the affairs and workings of their government. In rejecting the defendants' argument the court said:

The public's right to be informed about the affairs of government may thus conflict with the right of the individual to control access to information concerning his own affairs. The balance between these two competing interests has not yet been struck with clarity, and the nature and extent of each interest is yet to be satisfactorily determined. We believe, however, that, except in unusual circumstances, the task of balancing these interests must be left to the Legislature.

Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 676 (Tex. 1976), cert. denied, 430 U.S. 930 (1977).

The holding in Industrial Foundation makes it clear that virtually all information in the physical possession of a governmental body is "public information" subject to the Open Records Act. Whether such "public information" is excepted from public disclosure depends on whether it comes within one of the exceptions provided by the legislature. The "unusual circumstances" referred to by the court are not circumstances that would take information out of the coverage of the act, rather they are circumstances in which the balancing of an individual's right to privacy and the public's right to be informed are not properly left to the legislature through the exceptions it has enumerated in the act. The information in attachment "C-6" was collected by a public employee in the course of his employment. We have no difficulty concluding that attachment "C-6" is "information collected . . . in connection with the transaction of official business" within the meaning of section 3(a).

The informer's privilege is a well established aspect of section 3(a)(1). The informer's privilege has been

recognized by this office in over 25 published opinions. See, e.g., Open Records Decision No. 515 (1988), and authorities cited therein. The informer's privilege serves to encourage the flow of information to the government by protecting the identity of the informer. If the contents of the informer's statement would tend to reveal the identity of the informer, the privilege protects the statement itself to the extent necessary to preserve the informer's anonymity. Id. The privilege includes the identity of informants providing information to administrative officials having a duty of inspection in their particular spheres. 8 J. Wigmore, Evidence in Trials at Common Law § 2374, at 767 (McNaughton rev. 1961).

The grant to the foundation is under the authority of the Human Immunodeficiency Virus Services Act. While TDH has not yet promulgated rules to implement its provisions, article 2 of that act makes it clear that TDH is to monitor and evaluate the effectiveness of funded programs. Moreover, the informers' statements in attachment "C" allege, inter alia, misuse of funds provided under the grant. While the statements are not expressed in legal terms, they allege possible violations of the law. With the exception of attachments "C-4" and "C-6," the statements are expressed as highly personal narratives, are in the handwriting of the informants, and contain statements which would tend to reveal the identity of the informants. Attachment "C-6," while not expressed as a personal narrative nor in the handwriting of the informants, nevertheless is a record of informants' statements which allege facts that could reveal the identities of the informants. As to this particular document, it is not reasonable to attempt to separate allegations which may reveal the identity of the informant from those which would not.

The responsibility of TDH to see that state funds provided to private entities in the form of grants are properly spent and the potential value of information gained from citizen informants in the furtherance of this duty lead us to conclude that the public policy behind the informer's privilege should apply here. Therefore, the information in attachment "C," with the exception of attachment "C-4," may be withheld from public disclosure under the informer's privilege aspect of section 3(a)(1) of the Open Records Act. The information in attachment "C-4" must be released. However, the informant's name may be deleted.

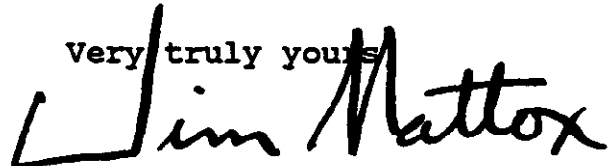
You also claim that some of the information in attachment "C" is exempted from public disclosure by the

common-law privacy and false-light privacy aspects of section 3(a)(1). As we do not find these concepts applicable to any material not already excepted from public disclosure by either the informer's privilege or the exception for intra-agency memoranda, we need not fully consider the application of these concepts here. However, we note, for example, that information which identifies an individual as having acquired immunodeficiency syndrome would probably be excepted from public disclosure by the common-law privacy aspect of section 3(a)(1) of the Open Records Act. See Industrial Foundation, supra. We mention this because the informer's privilege is waivable by TDH, whereas the privacy rights of another party are not. Open Records Decision No. 470 (1987); see also Health & Safety Code § 81.103.

#### S U M M A R Y

Certain information received by the Texas Department of Health from citizen informants with respect to a foundation receiving grants under the Human Immunodeficiency Virus Services Act, article 4419b-4, V.T.C.S., is excepted from required public disclosure by the informer's privilege aspect of section 3(a)(1) of the Open Records Act.

Very truly yours



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